

(2)

No. 90-223

Supreme Court, U.S.  
**FILED**  
**SEP 12 1990**  
JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

---

JIMMIE D. OYLER, SR.,

*Petitioner,*

vs.

THE HONORABLE EARLE D. JONES,

*Respondent.*

---

**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF KANSAS**

---

MELINDA SWANSON WHITMAN  
Assistant District Attorney  
Johnson County, Kansas  
P.O. Box 728  
Olathe, Kansas 66061  
(913) 791-5333  
*Counsel for Respondent*

---

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964  
OR CALL COLLECT (402) 342-2831

**BEST AVAILABLE COPY**

## QUESTION PRESENTED

Whether the State of Kansas has jurisdiction to prosecute Jimmie D. Oyler, Sr., for possession and sale of untaxed cigarettes from a "smokeshop" located on private property and not operated by an Indian tribe even though he is allegedly a tribal member of the Cherokee nation and his "smokeshop" is allegedly located on allotted land and when he is not exempt from payment of state sales tax in violation of Kansas law.

## **PARTIES**

The parties to the proceeding in the court whose judgment is sought to be reviewed include:

Jimmy D. Oyler, Sr., defendant and petitioner here.

The State of Kansas, plaintiff and the appropriate respondent here.

The Honorable Earle D. Jones, District Judge of the Tenth Judicial District of the State of Kansas, Presiding Judge whose decision is sought to be reviewed, listed as respondent here.

Although petitioner has named the Honorable Earle D. Jones as respondent, the State of Kansas was the party in the decision sought to be reviewed and would more properly be the respondent here.

## TABLE OF CONTENTS

	Page
Question Presented .....	i
Parties .....	ii
Table of Authorities .....	v
Statement of the Case .....	1
Summary of the Argument .....	5
Argument for Denying the Petition .....	7
I. The petitioner's request for review should be denied.....	7
A. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for this Court's jurisdiction .....	7
B. The burden is on the petitioner to show affirmatively that the Supreme Court has jurisdiction, a burden which the petitioner has failed to sustain in this case.....	8
C. Petitioner has not complied with the Rules of this Court.....	9
1. The petitioner has not complied with Rule 10.1(b) or (c) because the highest court in Kansas has not addressed the jurisdiction issue on its merits.....	9
2. The petitioner has not complied with Rule 13.1 of this Court because the petition for review was not timely filed ..	9
3. Petitioner's writ for review should be denied for lack of clarity and specificity in violations of Rules 14.1 and 14.5...	10

## TABLE OF CONTENTS – Continued

	Page
D. The decision of the Kansas State District Court finding jurisdiction was based on the decisions of this Court.....	12
Conclusion .....	12

## TABLE OF AUTHORITIES

Page

## CASES

<i>California State Board of Equalization v. Chemchuevi Indian Tribe</i> , 474 U.S. 9 (1985), <i>reh. denied</i> , 474 U.S. 1077 (1986) <i>cert. denied</i> , 481 U.S. 1051 (1987) ..	6, 12
<i>Dept. of Dental Hygiene of California v. Kirchner</i> , 380 U.S. 194 (1965), <i>on remand</i> , 43 Cal.Rptr. 329, 400 P.2d 321 (1965) .....	8
<i>Gotthilf v. Sills</i> , 375 U.S. 79 (1963).....	7
<i>Moe v. Salish &amp; Kootenai Tribes</i> , 425 U.S. 463 (1976) .....	4, 6, 12
<i>Sandquist v. California</i> , 419 U.S. 1066 (1974).....	7
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980) .....	4, 6, 12

## STATUTES

Kansas Statutes Annotated 79-3321(a), (n) .....	1, 5
Kansas Statutes Annotated 79-3322.....	1, 2, 5
28 U.S.C. 1254(1) .....	7
28 U.S.C. 1257.....	5, 7

## RULES

Rule 10.1(b), (c) Rules of the Supreme Court.....	9, 10
Rule 13.1, Rules of the Supreme Court.....	9, 10
Rule 14.1(e), (g), (h), (j), Rules of the Supreme Court .....	10, 11
Rule 14.5, Rules of the Supreme Court.....	10, 11



No. 90-223

---

In The  
**Supreme Court of the United States**  
October Term, 1990

---

JIMMIE D. OYLER, SR.,

*Petitioner,*

vs.

THE HONORABLE EARLE D. JONES,

*Respondent.*

---

**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF KANSAS**

---

**STATEMENT OF THE CASE**

On January 23, 1990, the State of Kansas filed a criminal complaint charging Jimmie D. Oyler, Sr. with violations of Kansas law for the possession and sale of untaxed cigarettes pursuant to Kansas Statutes Annotated 79-3321(a) and (n) and 79-3322. Under those subsections of the Kansas Statutes, it shall be unlawful for any person:

79-3321. (a) To possess, except as otherwise specifically provided by this act, more than 200 cigarettes without the required tax indicia being affixed as herein provided.

\* \* \*



(n) To sell cigarettes to a retailer or at retail that do not bear Kansas tax indicia or upon which the Kansas cigarette tax has not been paid.

The penalty provision is contained in KSA 79-3322(a):

79-3322. Penalties. (a) Any person who violates any of the provisions of this act, except as otherwise provided in this act, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or by both. In addition thereto any person found liable for any license or permit fee or tax imposed under the provisions of this act shall be personally liable for such license or permit fee or tax plus a penalty in an amount equal to 100% thereof.

The basis of the criminal complaint was contraband seized from Mr. Olyer's "Smokeshop" pursuant to a search warrant; specifically 8,888 cartons of cigarettes and four individual packs, none bearing tax stamps. After a trial to the court on April 3, 1990, the Honorable Earle D. Jones found petitioner guilty of violating Kansas law and sentence was pronounced on that date. Mr. Oyler immediately filed a notice of appeal and the case is currently on appeal in the Kansas Court of Appeals, with no opinion having yet been rendered. —

The petitioner's statement of the case contains numerous misstatements of the facts and asserts matters which were never part of the record in the trial court. Essentially, most of pp. 5-17 of petitioner's brief contain arguments, allegations and conclusions that are not facts of record in the case. As such, they are not properly considered by this Court in determining whether review by certiorari is warranted.

The facts of record established that the petitioner, Jimmie D. Oyler, Sr., privately owns roughly two acres of land which has been characterized as an allotment or is held by Mr. Oyler in some type of restricted status. (R. Vol. I, p. 77; Vol. III, pp. 40 & 63). On that private land Mr. Oyler owns and operates a private enterprise known as "Shawnee Jim's Indian Country Smokeshop". Mr. Oyler is 1/32 Cherokee Indian (R. Vol. I, p. 77).

The Cherokee nation in Oklahoma, of which petitioner claimed membership, did not have a tobacco ordinance at the time of this action. (R. Vol. III, p. 74). At no time has the Cherokee Tribe lived on, or controlled, petitioner's land. It has been held in his family exclusively. (R. Vol. III, p. 63).

On December 2, 1989, January 13 and 20, 1990, undercover agents with the Kansas Bureau of Investigation went to petitioner's "Smokeshop" and purchased cigarettes from the petitioner that did not have the required tax indicia and the officers did not pay state sales tax on the purchases. (R. Vol. 9-10, 14, 22, 25, 27-28). The undercover officers are not Indians or members of Mr. Oyler's "tribe" and petitioner never asked them if they were. (R. Vol. III, pp. 11, 25, 30). Mr. Oyler never disputed that he would sell cigarettes to anyone who came into his "Smokeshop". (R. Vol. III, pp. 68-69, 83).

Mr. Oyler has never applied for, nor received a cigarette tax license. (R. Vol. III, pp. 37, 50). Mr. Oyler is not exempt from payment of state sales tax. (R. Vol. III, p. 34). The Kansas Department of Revenue criteria for exemption are based on the pronouncements of this Court in

*Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

According to the Kansas Department of Revenue, Mr. Oyler did not qualify for an exemption from payment of Kansas state sales tax because: (1) the land on which he operates his "smokeshop" is not under the control of an Indian tribe; (2) the sales of cigarettes from his "smoke-shop" are not made by the tribe itself nor by a retailer approved by the tribe under regulations or ordinances adopted by tribal government; and (3) the cigarette sales by petitioner have not been restricted to members of the same tribe which controls the reservation and regulates the retailer. Sales made to non-Indians or members of other tribes are not exempt from payment of state cigarette and sales tax. (R. Vol. III, pp. 40-42, 48, 52). Petitioner has maintained at all times that his land is exempt from all laws and that he is not subject to any state laws. (R. Vol. III, p. 72).

In the criminal prosecution in Johnson County District Court, the petitioner filed a motion to dismiss the criminal complaint for lack of jurisdiction on February 22, 1990. That issue was fully briefed and addressed by the parties and, after a hearing on March 3, 1990, the motion was denied by the Honorable Earle D. Jones. (R. Vol. I, p. 6, and Vol. II). Subsequently, on March 3, 1990, petitioner filed a "Writ of Prohibition and/or Mandamus" with the Kansas Supreme Court which was denied by the Court on March 30, 1990, with a formal order filed on April 23, 1990. Petitioner's "Writ of Prohibition and/or Mandamus" was essentially a motion to stay the criminal proceedings.

On April 3, 1990, after a trial to the Court, the Honorable Earle D. Jones found the petitioner guilty of possessing more than 200 cigarettes without the required tax indicia being affixed as required by K.S.A. 79-3321(a) and 79-3322, and guilty of three counts of selling cigarettes at retail that did not bear Kansas tax indicia or upon which Kansas cigarette tax had not been paid in violation of K.S.A. 79-3321(n) and 79-3322. (R. Vol. I, p. 11). Petitioner has appealed that decision to the Kansas Court of Appeals. The issue on appeal is whether the trial Court had jurisdiction over him.

Petitioner's request for certiorari to the Kansas Supreme Court should be denied because it does not comply with any of the provisions for discretionary review by this Court.

---

### SUMMARY OF THE ARGUMENT

Petitioner's request for review is prematurely filed as there has been no decision from the highest court of the State whose decision is sought to be reviewed. 28 U.S.C. 1257. Additionally, petitioner's request for review does not comply with the Rules of this Court and there is no provision for the relief petitioner is requesting. Accordingly, Respondent, State of Kansas, prays that petitioner's petition for "Writ of Certiorari to the Supreme Court of the State of Kansas" be denied in its entirety.

The facts in this case establish that the trial court found that it had criminal jurisdiction over Jimmie D. Oyler, Sr. The petitioner filed a "Writ of Prohibition and/or Mandamus" with the Kansas Supreme Court five days

before the criminal trial. Essentially, petitioner was requesting that the Kansas Supreme Court stay the criminal proceedings which it is declined to do. Petitioner was subsequently convicted by the trial court and has appealed those convictions. That appeal is currently pending in the Kansas Court of Appeals. The petitioner's brief here requests that this Court grant Certiorari to the Kansas Supreme Court. No provision exists for the relief requested by the petitioner. No final judgment has ever been entered by the highest court in Kansas. Petitioner has not cited the appropriate jurisdictional statute to this Court and has not complied with the Rules of this Court in the preparation of his petition.

The decision of the trial court finding that it had criminal jurisdiction over petitioner is firmly anchored in pertinent decisions of this Court from *California State Board of Equalization v. Chemchuevi Indian Tribe*, 474 U.S. 9 (1985), *reh. denied*, 474 U.S. 1076 (1986), *cert. denied*, 481 U.S. 1051 (1987); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). The petitioner was subsequently convicted of violations of Kansas statutes and has appealed that conviction to the intermediate appellate court in Kansas. The issue on appeal is whether the trial court had jurisdiction. If the Kansas Court of Appeals affirms the petitioner's conviction and the trial court's finding as to jurisdiction, the petitioner will still have the right of appeal to the Kansas Supreme Court.

Based on the foregoing, the petitioner's request for review is premature and should be summarily denied.



## ARGUMENT FOR DENYING THE PETITION

- I. The petitioner's request for review should be denied.
  - A. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for this Court's jurisdiction.

The petitioner's request for review by certiorari should be dismissed as this Court presently has no jurisdiction. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for the Court's jurisdiction. This is not the appropriate statute. The record in this case clearly establishes that the case involving petitioner's criminal conviction by a Kansas state district court is currently on appeal to the Kansas Court of Appeals. No federal circuit court of appeals has ever been involved in this case and, as such, 28 U.S.C. 1254(1) is not applicable. A review of the appropriate jurisdictional statute, 28 U.S.C. 1257, also leads to the result that this Court has no jurisdiction as there has been no final order from the state's highest court.

Supreme Court jurisdiction to review state court decisions is limited by 28 U.S.C. 1257 to "final judgments and decrees". Essentially, the requirement is that all opportunities for review by higher state courts be exhausted before a litigant invokes the jurisdiction of the Supreme Court. The judgment of a state trial court, or an intermediate appellate court, is not the judgment of the highest state court in which judgment could be had if the party seeking review has failed to invoke even the discretionary jurisdiction of a higher state court. *See, e.g., Sandquist v. California*, 419 U.S. 1066 (1974); *Gotthilf v. Sills*, 375 U.S. 79 (1963).

In this case, the petition for review by way of certiorari is premature. The petitioner did file a "Writ of Prohibition and/or Mandamus" after the trial court denied petitioner's "Motion to Dismiss" and found that it had jurisdiction. Nevertheless, the order of the Kansas Supreme Court denying a stay was not a final judgment of the court as to the issue of jurisdiction.

Petitioner has erroneously stated at page 20 of his brief that "the Kansas Supreme Court has decided the Treaty Issue in a way that conflicts with applicable decisions of this Court namely, that treaties are the Supreme Law of the land." As has been previously stated, the Kansas Supreme Court has never decided the issue of jurisdiction on the merits. The only order entered by the Kansas Supreme Court with reference to this case was that a stay of the criminal trial was not appropriate. That order is not a contrary decision on the "Treaty Issue."

**B. The burden is on the petitioner to show affirmatively that the Supreme Court has jurisdiction, a burden which the petitioner has failed to sustain in this case.**

The party requesting review by this Court must affirmatively show that the Court has jurisdiction. *See e.g., Dept. of Dental Hygiene of California v. Kirchner*, 380 U.S. 194 (1965), *on remand*, 43 Cal. Rptr. 329, 400 P.2d 321 (1965). It must affirmatively appear that a federal question was raised in the state court and that the federal question was actually decided. The petitioner has failed to sustain this burden.



**C. Petitioner has not complied with the Rules of this Court.**

An application to the United States Supreme Court for writ of certiorari to review the judgment of a state court must be made in the manner and within the time prescribed by statute and the Rules of the Supreme Court. The petition for review in this case does not comply with applicable statutes nor with the Rules of this Court.

- 1. The petitioner has not complied with Rule 10.1(b) or (c) because the highest court in Kansas has not addressed the jurisdiction issue on its merits.**

The highest court in Kansas, the Kansas Supreme Court, has not addressed the issue of jurisdiction over Mr. Oyler, which is the issue petitioner is presumably asking this Court to review. Further, the Kansas Supreme Court has never decided a federal question in a way which conflicts with the decision of another state court of last resort or of a United States Court of Appeals, a circumstance which is contemplated by Rule 10.1(b) before this Court will entertain discretionary review. Additionally, the decision of the trial court does not conflict with applicable decisions of this Court. Rule 10.1(c).

- 2. The petitioner has not complied with Rule 13.1 of this Court because the petition for review was not timely filed.**

Even if there was some provision which would allow this Court to review the finding of a Kansas state trial



court concerning the issue of jurisdiction, petitioner has not filed his request for review in a timely manner.

Rule 13.1 of this Court provides that a "petition for writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed . . . within 90 days after the entry of the order denying discretionary review." Petitioner is presumably proceeding under this rule, and, if so, the petition for review has not been timely filed.

The record reflects that the state district court's Journal Entry reflecting its denial of petitioner's Motion to Dismiss was filed on March 27, 1990 by the Clerk of the District Court of Johnson County, Kansas. There was no interlocutory appeal taken from that order, nor was there a motion for rehearing filed by the petitioner. As previously mentioned, the petitioner was found guilty in a trial to the court on April 3, 1990. The petitioner never filed a motion for new trial pursuant to Kansas procedure and the conviction is currently on appeal to the Kansas Court of Appeals. Even assuming that this Court would consider reviewing a decision of a trial court denying a motion to dismiss, the petitioner has not filed his petition for review in a timely manner. The Journal Entry denying petitioner's Motion to Dismiss was filed on March 27, 1990. The instant petition for review was not docketed by the Clerk of this Court until July 13, 1990, more than 90 days since the entry of that order. No review of that order has ever been requested nor denied.

**3. Petitioner's writ for review should be denied for lack of clarity and specificity in violations of Rules 14.1 and 14.5.**

Review by this Court on writ of certiorari is not a matter of right, but of discretion. Rule 10.1. Such a petition should be granted only when there are special and important reasons therefor. The petitioner has provided no special nor important reasons to the Court. The petitioner's request should also be denied for a violation of Rule 14.1, subsections (e), (g), (h), (j), and Rule 14.5.

It is not at all clear from the petition what is being requested. The petitioner has entitled his brief as a "Petition on Writ of Certiorari to the Supreme Court of the State of Kansas," yet on page 1 of his brief he requests that this Court review the judgment of the Kansas Supreme Court of April 23, 1990, denying his "Writ of Prohibition and/or Mandamus." The petitioner appears to argue in his brief, however, that this Court should review the decision of the trial court, The Honorable Earle D. Jones, denying his Motion to Dismiss. Petitioner has not concisely nor specifically set out what relief he is requesting from this Court, nor the legal basis on which the Court could grant that relief.

Accordingly, and pursuant to Rule 14.5 of this Court, the petition should be summarily denied because the petitioner's brief has failed to set forth with accuracy, brevity and clearness the essential facts necessary for this Court to consider. The Rule states that this alone is a sufficient reason for denying the petition for review.

**D. The decision of the Kansas State District Court finding jurisdiction was based on the decisions of this Court.**

The issue of whether states can validly tax sales of cigarettes from Indian "smokeshops" has been reviewed by this Court on several occasions. The petitioner in this case has consistently ignored those decisions. This Court has consistently held that a state has the right to require an Indian retailer to collect excise tax on cigarettes sold by a tribe to non-Indian purchasers. *See, e.g., California State Board of Equalization v. Chemchuevi Indian Tribe*, 474 U.S. 9 (1985), *reh. denied*, 474 U.S. 1077 (1986); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). The decisions in these cases were considered by the trial court in finding that it had jurisdiction over petitioner.

---

**CONCLUSION**

For the reasons articulated above, Respondent, State of Kansas, respectfully requests this Honorable Court to deny Mr. Oyler's petition for writ of certiorari in its entirety.

Respectfully submitted,

MELINDA SWANSON WHITMAN  
*Counsel of Record for*  
*Respondent, State of Kansas*

APPENDIX

IN THE DISTRICT COURT OF  
JOHNSON COUNTY, KANSAS,  
CRIMINAL DEPARTMENT

STATE OF KANSAS,

Plaintiff,

vs.

No. K-62583

JIMMIE D. OYLER,

Defendant.

JOURNAL ENTRY

Now on this 5th day of March, 1990, this matter comes on for further proceedings before the Honorable Earle D. Jones, Judge of the District Court of Johnson County, Kansas. The State appears by Melinda S. Whitman, an Assistant District Attorney. The defendant appears in person and with his counsel, Pamela S. Thompson.

Thereupon, this matter comes on before the Court on the defendant's motion to dismiss the criminal Complaint.

The Court, being well and duly advised in the premises, denies the defendant's motion to dismiss. The matter is set for trial to the Court on the 3rd day of April, 1990 at 8:30 a.m.

/s/ \_\_\_\_\_  
Earle D. Jones,  
District Judge  
Court Number 8  
Johnson County  
District Court

Submitted by:

/s/ \_\_\_\_\_

Melinda S. Whitman

11610/mas

Assistant District

Attorney

### CERTIFICATE

I hereby certify that a true copy of the above and foregoing Journal Entry was placed in the U.S. Mail, postage prepaid, to Pamela Thompson, Attorney at Law, P.O. Box 104, Horton, Kansas 66439 on this 27th day of March, 1990.

/s/ \_\_\_\_\_

Melinda S. Whitman

  

---

SUPREME COURT ORDER  
DISTRICT CASE NO. K62583

IN THE SUPREME COURT  
OF THE STATE OF KANSAS

PAMELA S. THOMPSON  
P.O. BOX 104  
HORTON, KS 66439

JIMMIE D. OYLER	PETITIONER,
V	NO. 90-64967-S
HONORABLE EARLE D. JONES,	RESPONDENT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOW-  
ING ACTION TAKEN IN THE ABOVE ENTITLED CASE:

PETITION FOR WRIT OF PROHIBITION AND/OR  
MANDAMUS.

DENIED.

DATE: 04/23/90

YOURS VERY TRULY  
LEWIS C. CARTER  
CLERK, SUPREME COURT

---